Supreme Court, U. S.
FILED
JUL 11 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

No. 74-949

MARY AKIN, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONS FOR CERTIORARI FILED JANUARY 30, 1975 AND FEBRUARY 1, 1975

CERTIORARI GRANTED AND CASES CONSOLIDATED APRIL 28, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., *Petitioners*

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX

U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 4497

UNITED STATES OF AMERICA,
Plaintiff

v.

AKIN, MARY, ET AL.,
Defendants

RELEVANT DOCKET ENTRIES

1972

November 14—Complaint

1973

June 21—Judgment

July 20—Order

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Civil Action No. 73-1807

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

AKIN, MARY, ET AL.,
Defendants-Appellees

RELEVANT DOCKET ENTRIES

1974

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October 10—Revised page 3 of Opinion

October 16—Petition for Rehearing En Banc

October 30—Ex Parte Letter of Supplemental Authority from U.S.

November 12—Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

December 12—Order Recalling and Staying Mandate to January 13, 1975, Pending Certiorari

1975

January 10—Order Granting Further Stay of Mandate to February 9, 1975

IN THE DISTRICT COURT WITHIN AND FOR WATER DIVISION NO. 7
STATE OF COLORADO

IN THE MATTER OF THE APPLICATION OF SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT

MOTION

COMES Now, the Southwestern Colorado Water Conservation District, by its attorney L. W. McDaniel, and moves the Court for an Order requiring the Water Clerk to serve process on the United States of America, pursuant to 43 U.S.C., Section 666, 66 Stat. 560, commonly known as the McCarran Amendment, and as grounds therefore, states and shows as follows:

That the United States of America has recently filed in the District Court of the District of Colorado, Civil Action

No. C-4497, which action affects all the water users in water Division No. 7 of the State of Colorado and that pursuant to the provisions of 148-21-18(3)(c), the United States of America should receive a copy of the resume prepared by the Water Clerk of this Court.

By: /s/ L. W. McDANIEL
L. W. McDaniel
P. O. Box 1157
Durango, Colorado 81301
247-1755

(Caption Omitted in Printing)

ORDER

THIS MATTER, coming before the Court upon the Motion of the Southwestern Colorado Water Conservation District and it appearing to the Court from the Motion and statements of counsel that the United States of America has water claims within Water Division No. 7, State of Colorado, which claims may be affected by the claims of other water users within water Division No. 7.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Water Clerk for Water Division No. 7, State of Colorado is ordered to serve a copy of the resume of all water applications in said water Division No. 7 which have been filed during the month of November, 1972, upon the United States of America pursuant to the provisions of 43 U.S.C., Section 666, and in accordance with the Federal Rules of Civil Procedure, Rule 4(d)(4).

DONE AND SIGNED, this 21st day of December, 1972.

BY THE COURT:

/s/ WILLIAM S. EAKES
Judge

(Caption Omitted in Printing)

CERTIFICATE OF MAILING

I, ELDON KOONTZ, do hereby certify that I am the Clerk for Water Division No. 7, State of Colorado and that on December 22, 1972, I placed in the United States Mail, postage pre-paid, certified mail, return receipt requested, two copies of all the Water Resume Applications in said Water Division No. 7, State of Colorado, filed in my office during the month of November, 1972, directed to Richard G. Kleindienst, Attorney General of the United States, Department of Justice, Constitution Avenue and 10th Street, N.W., Washington, D.C., 20530.

Dated this 22nd day of December, 1972.

/s/ ELDON KOONTZ
Eldon Koontz
Water Clerk

PLAINTIFF
DEFENDANT
TO: ALL PERSONS INTERESTED IN WATER APPLICATIONS IN SAID WATER DIVISION NO. 7
TYPE OF WRIT: Resume

SERVE: United States of America,
AT

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:
Frank E. Maynes
Attorney at Law
115 West 11th St. - P. O. Box 497
Durango, Colo. 81301

Show number of this writ and total number of writs placed in, 1 of 1, 1 of 3 etc.: NO. 1 TOT. 1

CHECK IF APPLICABLE:
XX One copy for U. S. Attorney or delegee and two copies for Attorney General of the U. S. included. Cert.# 220024, RRR

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:

FILED
IN DISTRICT COURT
WATER DIVISION 7
DURANGO, COLORADO
FEB 16 1973.
Ruby S. Koontz
CLERK

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR: Frank E. Maynes | TELEPHONE NUMBER: 247-1755 | DATE: 12/29/72

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (or applicable code) and sign USM-285 for first writ only if more than one writ submitted. | DEPOSIT/CODE | DIST. OF ORIGIN 13 | DIST. TO SERVE 13 | LOCATION OF SUB-OFFICE OF DIST. TO SERVE

I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown. | SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK: Carrie Helfer | DATE: 12/29/72

☒ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc. at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc. named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above): JAMES TREECE U.S. ATTORNEY
☐ A person of suitable age and discretion then residing in the defendant's usual place of abode
ADDRESS (Complete only if different than shown above)
FEE (If applicable): $ 3.00 | MILEAGE: $ --

DATE(S) OF ENDEAVOR (Use Remarks if necessary) | DATE OF SERVICE: 1-3-73 | TIME: 3:30 PM | SIGNATURE OF U. S. MARSHAL OR DEPUTY: J. Marshall

REMARKS

USM-285 (Rev. 7-76)

No. 220024 Certified Mail #7

RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

SENT TO: Attorney General
STREET AND NO.
P.O. STATE AND ZIP CODE: Wash. D.C.
POSTAGE AND FEES
RETURN RECEIPT SERVICES
1. Shows to whom and date delivered
2. Shows to whom, date and address of delivery
DELIVERED TO ADDRESSEE ONLY
SPECIAL DELIVERY (extra fee required)
POSTMARK OR DATE

PS Form 3800 NO INSURANCE COVERAGE PROVIDED—NOT FOR INTERNATIONAL MAIL (See reverse)

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)
X Show to whom, date and address delivered
☐ Deliver ONLY to addressee

RECEIPT
Received the numbered article described below.
REGISTERED NO. | SIGNATURE OF ADDRESSEE (Must always be obtained)
CERTIFIED NO. 220024
INSURED NO. | SIGNATURE OF ADDRESSEE'S AGENT, if any
by H. Whitmore
DATE DELIVERED | POSTMARK (Required for Registered and Insured Mail. Not required for Certified)

District Court, Durango, Colorado
State of Colorado
Water Division No. 7
Certified to be a full true and correct copy of original in my custody.
Dated May 8 1974
Clerk Ruby S. Koontz
Deputy

BEST COPY AVAILABLE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 4497

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AKIN, MABY, ET AL., *Defendants*.

MOTION OF THE COLORADO RIVER WATER CONSERVATION DISTRICT TO INTERVENE AS A DEFENDANT

The Colorado River Water Conservation District, with offices in Glenwood Springs, Colorado, moves to intervene as a defendant in this action under F.R.C.P., R. 24, in order to assert a Motion to Dismiss as set out in the proposed Motion to Dismiss attached hereto. In the event the Motion to Dismiss is denied, movant intends to answer and to defend against the claims of the United States deemed prejudicial to movant's rights and claims. As grounds for intervention, movant states:

1. The Colorado River Water Conservation District, hereinafter referred to as "River District", is a public agency established by the Colorado State Legislature in 1937 (Col. Rev. Stat. (1963) ¶¶ 150-7-1 et seq.), comprising all of twelve and parts of three other counties in north-western and west-central Colorado. The River District was formed for the purposes of conserving and developing the waters of the Colorado River and its tributaries within the state of Colorado and within the area of the River District. The headwaters and substantial portions of principal tributaries of the Colorado River, including the Yampa, White and Gunnison Rivers, arise within the geographic area of the River District and traverse the same. The River District believes that the conservation and development of these waters may well be impaired by this action.

2. In 1922, the Colorado river basin states (Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming), with the consent of the Congress of the United States (42 Stat. 171) entered into an interstate compact regarding the division and use of the waters of the Colorado River. Such compact provides, among other things, by Article III(d) that the states of the Upper Division (Colorado, New Mexico, Utah and Wyoming) "will not cause the flow of the river at Lee Ferry (in the compact defined as a measuring point on the Colorado River in Arizona one mile below the mouth of the Paria River) to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in containing progressive series . . .". Any curtailment of Upper Division use of water occasioned as a consequence of this provision is referred to herein as the "Lee Ferry call".

3. The River District, pursuant to its statutory powers has been active in the planning and implementation of projects to conserve and develop for beneficial use the waters of such rivers, within its area, frequently in cooperation with the Bureau of Reclamation, Department of the Interior.

4. Included among such projects making beneficial use of water and already constructed within the area of the River District are Colbran, Bostwick Park, Paonia, Silt and Smith Fork Federal Reclamation Projects, and Ruedi Reservoir, a component of the FryingPan-Arkansas Federal Reclamation Project. Additional Federal Reclamation Projects are the West Divide and Dallas Creek Federal Reclamation Projects, authorized for construction by the Colorado River Basin Project Act, 82 Stat. 885 (1968), Fruitland Mesa and Savery-Pothook Federal Reclamation projects authorized for construction by Congress by the

Act of September 2, 1964, 78 Stat. 852, as well as the Upper Gunnision, Bostwick, Lower Yampa, Blue Mesa, Yellow Jacket, Bluestone, Grand Mesa, Upper Yampa, Eagle Divide, and Middle Park proposed Federal Reclamation Projects, concerning which feasibility studies are already completed, in progress or programmed for commencement.

5. Apart from assisting in the furtherance of the federal undertakings, the River District has surveyed and planned and was the claimant of and holds the decrees for a number of additional projects to conserve and develop the waters of the region within the area of the River District, including the Rangely, Redcliff and Snowmass projects, the ultimate construction and operation of which in large measure depend upon when and if a demand is or will be made upon the Upper Division to release waters for the benefit of the Lower Division pursuant to the Colorado River Compact referred to above.

6. Colorado, by its Constitution, has rejected the riparian doctrine with regard to natural streams within the state, and has espoused the doctrine of appropriation (Colo. Const. Art. XVI, 5, 6, *Coffin* v. *Left Hand Ditch Co.*, 6 Colo. 443 (1882)). The latter doctrine recognizes the right to make beneficial use of the waters of natural streams even though the flow of such streams is diminished, such right, in times of shortage, being exercised in order of priority, that is, first in time of use is first in right of use. All of the projects named in paragraphs 4 and 5 of this Motion though senior in priority to some claimed uses within the state are junior in point of time and right to use to 1922 and are therefor subservient to a Lee Ferry call. The River District believes that almost all, if not all, of the projects above referred to will have to, of necessity, curtail in whole or in part their diversions of water for beneficial use within the state of Colorado and the area of the District in the event of a Lee Ferry call for water for the benefit of the states of

the Lower Division under the Colorado River Compact of 1922.

7. The Mancos, LaPlata, Animas, Florida, Los Pinos (Pine), Piedra, San Juan and Navajo Rivers and the waters tributary to such streams, are tributary to the Colorado River upstream from Lee Ferry above referred to, and consequently contribute waters at such measuring point to meet any requirement imposed upon the states of the Upper Division by the above referred to Colorado River Compact of 1922.

8. By its Complaint herein, the United States of America claims title to waters from the tributaries of the Colorado River named in its Complaint with priority dates antedating, in many cases, the priority dates awarded to the projects referred to in paragraphs 4 and 5 of this motion and in unspecified and unquantified amounts. Because of the doctrine of prior appropriation when the Lee Ferry call for water is made, the heretofore recognized rights and claims of the River District and of present users for beneficial purposes within the geographic area of the District, will have to curtail in advance of any limitation of the rights to the use of water claimed by the United States of America in its Complaint herein if the dates of priority claimed by the United States are awarded to it.

9. Such curtailment of the use of water by such projects and users within the geographic area of the District, will cause irreparable harm and injury to the River District and to the water users within the geographic area of the District.

10. The interests of the River District are not fully nor adequately represented by any of the existing parties to this litigation. The River District believes it has an interest such as to entitle it to intervene as of right under F.R.C.P., R. 24(a). If the River District may not intervene as of right, it nonetheless believes its motion presented

herein will not unduly delay or prejudice the prosecution of the Complaint herein, and intervention for the reasons hereinbefore set out should be permitted under F.R.C.P., R. 24(b).

DELANEY & BALCOMB

By: /s/ KENNETH BALCOMB
Kenneth Balcomb
Attorneys for Colorado River Water Conservation District
P. O. Drawer 790
Glenwood Springs, Colorado
81601
303-945-6546

Address of the District:
P.O. Box 1120
Glenwood Springs, Colorado
81601
303-945-8522

(Caption Omitted in Printing)

MOTION TO DISMISS

(Filed February 13, 1973)

The Southeastern Colorado Water Conservancy District (hereinafter referred to as "District") respectfuly moves this Court to dismiss the above and foregoing action as not being cognizable by this Court for the following reasons:

1. This Court is without jurisdiction to hear and determine the subject matter of the allegations in the Complaint.

2. The allegations made in the motion of the District to intervene are incorporated herein by reference as though fully set forth herein.

3. By the Water Rights Determination and Administration Act of 1969, C.R.S. 1963, § 148-21-1, et seq., the State of Colorado established by statute a system for the adjudication of waters of the natural streams in the State of Colorado. Division 7 comprises all lands in the southwestern portion of the State of Colorado, and the San Juan, Piedra, Florida, Las Animas, Los Pinos, LaPlata, Mancos and Dolores Rivers.

4. The United States of America has been made a party to adjudication proceedings now pending in Division 7 relating to all rivers therein, as will appear from Exhibit A hereto attached and hereof made a part. The United States of America is a person within the meaning of said Water Rights Determination and Administration Act. Service on the United States was made pursuant to the McCarran Act, 43 U.S.C. 666.

5. The United States of America now has filed claims in the appropriate state courts in Water Divisions 4, 5 and 6 in Western Colorado for many uses and purposes, which claims are now pending and undisposed of, all thereof being filed pursuant to the McCarran Amendment, 43 U.S.C. 666, and the decision in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520, and *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527.

6. Any and all claims for waters asserted by the United States in this proceeding can and should be claimed in the appropriate state courts of the State of Colorado in Division 7 in the same manner as are being asserted in the state courts in Divisions 4, 5, and 6.

7. This Court should dismiss this action and the United States should initiate its claims in Division 7 pursuant to the Water Rights Determination and Administration Act.

Respectfully presented,

FAIRFIELD AND WOODS

By: /s/ HOWARD K. HOLME
Howard K. Holme
Attorneys for Southeastern Colorado Water Conservancy District
1536 First National Bank Bldg.
Denver, Colorado 80202
Telephone: 534-6135

Address of the District:

P.O. Box 440
Pueblo, Colorado 81002

MAYNES & ANESI
ATTORNEYS AT LAW
115 West Eleventh Street
Durango, Colorado 81301

February 2, 1973

Mr. Charles J. Beise
1536 First National Bank Building
Denver, Colorado 80202

Dear Chuck:

As per our telephone conversation of this date, enclosed please find copy U.S. Marshals Service together with the Receipt for Certified Mail and Receipt for Water Division No. 7.

Very truly yours,

/s/ FRANK E. (SAM) MAYNES
Frank E. (Sam) Maynes

54.792

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

PLAINTIFF
DEFENDANT
TO: ALL PERSONS INTERESTED IN WATER APPLICATIONS IN SAID WATER DIVISION NO. 7
COURT NUMBER
TYPE OF WRIT: Resume

SERVE: NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN
United States of America,
AT: ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:
Frank E. Maynes
Attorney at Law
115 West 11th St. - P. O. Box 497
Durango, Colo. 81301

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc.: NO. 1 OF TOTAL 1

CHECK IF APPLICABLE:
XX One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included. Cert.# 220024, RRR

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE:

SPECIAL INSTRUCTIONS:

FILED
IN DISTRICT COURT
WATER DIVISION 7
DURANGO, COLORADO
FEB 16 1973.
Ralph E. Woods
CLERK

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR: Frank E. Maynes
TELEPHONE NUMBER: 247-1755
DATE: 12/29/72

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (or applicable code) and sign USM-285 for first writ only if more than one writ submitted.
DEPOSIT/CODE
U.S.T. OF ORIGIN: 13
DISTRICT TO SERVE: 13
LOCATION OF SUB-OFFICE OF DIST. TO SERVE

I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown.
SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK: Carrie Helfer
DATE: 12/29/72

☒ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above): JAMES TAFFEE U.S. ATTORNEY
☐ A person of suitable age and discretion then residing in the defendant's usual place of abode.

ADDRESS (Complete only if different than shown above)
FEE (If applicable): $ 3.00
MILEAGE: $ --

DATE(S) OF ENDEAVOR (Use Remarks if necessary)
DATE OF SERVICE: 1-3-73
TIME: 2:34 ☒ AM ☐ PM
SIGNATURE OF U. S. MARSHAL OR DEPUTY: By Marshal Carrie Helfer

REMARKS:

District Court, Durango, Colorado
State of Colorado
Water Division No. 7
C - d to be a full, true and correct copy of original in my custody.
Dated June 8, 1973
Clerk Ralph E. Woods
Deputy

54.792

USM-285 (Rev. 7-1-70)
1. CLERK OF THE COURT

BEST COPY AVAILABLE

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
JUN 11 1973
JAMES R. MANSPEAKER

6

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Office of the Clerk

October 10, 1974

MEMORANDUM TO: ALL RECIPIENTS OF OPINION IN No. 73-1807, U.S.A. v. MARY AKIN, ET AL.

The Court, upon its own motion, has filed a revised page three which should be inserted in lieu of page three of the opinion in the captioned case which was filed October 2, 1974.

Sincerely yours,

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

• • •

United States and on behalf of the Ute Mountain and Southern Ute Indian Tribes on November 14, 1972. It sought the adjudication of all water rights held by the United States in its own right and as trustee for the Ute Mountain and Southern Ute Indian Tribes in the San Juan Basin but, particularly, adjudication of all of its reserved rights in the San Juan River of Colorado. There are approximately 1200 named defendants.

The reserved rights asserted by the United States consist of those used in connection with Mesa Verde National Park, the Yucca House National Monument, the Hovenweep National Monument, Bureau of Reclamation projects within the State of Colorado and lands reserved by the United States in Colorado. On behalf of the Indian tribes the United States claims further reserved rights for use of the Ute Mountain Ute Tribe and the Southern Utes on their reservations. The Colorado River Water Conservation District intervened as a defendant for the purpose of

filing a motion to dismiss. Other intervenors followed including the Southeastern Colorado Water Conservancy District and the Board of Water Commissioners, City and County of Denver.

A subsequent suit was filed on January 3, 1973 in State Court by the Mancos Water Conservation District and the Southeastern Colorado Water Conservancy District embracing similar subject matter.* In this action the plaintiffs sought judicial determination of the identical water rights which the United States sought to have adjudicated. The United States was joined as a defendant in the state action pursuant to the so-called McCarran Amendment, 43 U.S.C. § 666, which allows a joinder of the United States in such a suit in state court.

• • •

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* It has been called to our attention in an informal letter from one of the attorneys for defendants-appellees that this statement is incorrect. It is said that on that date Southwestern Colorado Water Conservation District filed a motion for the joinder of the United States under the McCarran Act. The record does not reveal the true fact. We note the suggested correction, even though it is not outcome determinative.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 73-1807

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MARY AKIN, et al.,
Defendants-Appellees.

PETITION FOR REHEARING IN BANC

(Filed October 16, 1974)

COME Now the above-named defendants-appellees by and through the Attorney General of the State of Colorado and petitions the United States Court of Appeals for the Tenth Circuit for a rehearing in banc in the above-captioned matter.

ARGUMENT

I.

The Court Misapprehended the True Parameters of the Doctrine of Abstention and Adopted a Constricted and Partial View of the Doctrine.

The doctrine of abstention vests with the federal courts the discretionary authority to decline to entertain issues presented even though the court is possessed with jurisdiction to so determine. The landmark abstention decision is *R.R. Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941). The United States Supreme Court, in reviewing the lower court's determination, which enjoined the Railroad Commission's order, established the initial fundamental principles of the doctrine. Two of those principles are relevant to this case. Firstly, the power to stay or

defer action is to be exercised in furtherance of fostering the harmonious relations between state and federal authorities. Secondly, in the absence of a showing that the state adjudicatory process cannot be pursued with full protection of the claims, the court should exercise its discretion to stay its hand.

The decisions which have followed *Pullman* have given greater breadth to the doctrine of abstention. Of particular note is *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), which is noted in the court's opinion in *United States* v. *Akin*, No. 73-1807, decided October 2, 1974 (hereinafter cited as "*Akin*"), at 11. The *Akin* opinion recognizes that abstention is proper when the federal court action would interfere with a state regulatory scheme but held this principle to be inapplicable to the present case apparently because it characterized the Colorado water right determination and administration procedure as something other than a state administrative regulatory system. *See, Akin* at 11-12. Concededly, the Colorado system of water right determination and administration is primarily judicial. However, this procedure fulfills the same function as schemes in other appropriative states which are more purely administrative and should likewise be held to be within the purview of the *Burford* category.

The rationale behind this particular principle of abstention is to maintain the integrity of a state regulatory scheme—be it an "administrative" or a "judicial" one—and thus enhance federal-state harmony. Surely the principle does not depend upon the technical nature of the regulatory system chosen by the particular state. *Burford* and the other cases in this category cited by the court do not focus upon the specific nature of the state regulatory system. The determinative factor has been simply the existence of an adequate and comprehensive state regulatory system. Colorado has developed over some one hundred years of statehood a regulatory system which has

special and peculiar capabilities to handle the adjudication and administration of water rights. It is submitted that the elimination of the Colorado regulatory scheme from this category of abstention merely because of the judicial character of the Colorado process is erroneous and not supported by the law.

The avoidance of unnecessary interference with state functions is of particular weight when the federal right is "entangled in a skein" of a state regulatory system. *Gay* v. *Board of Registration Comm'rs,* 466 F.2d 879, 884 (1972). On this point, the court erroneously concluded in *Akin* at 15-16 that the decision of the United States Supreme Court in *United States* v. *District Ct., County of Eagle, Colorado,* 401 U.S. 520 (1971) (hereinafter cited as *"Eagle County"*), does not suggest the propriety of abstention in this case. *Eagle County* held that federal water rights, including any reserved water rights, may be integrated into the Colorado water right administration and adjudication system. *Eagle County* and its companion case, *United States* v. *District Court for Div. No. 5,* 401 U.S. 527 (1971) affirmed the Colorado Supreme Court's decision, 169 Colo. 555, 458 P.2d 760 (1969), that the State's regulatory system provides an orderly and competent procedure for determinating and administrating all water rights. The assertion in *Akin* at 14-15 that abstention is less compelling where the United States advances a national interest is undermined by the Supreme Court's declaration that the Colorado system is adequate to hear federal water right claims. It would be contrary to these astute decisions to cast aside the recognized adequacy and efficiency of the State procedure, thereby relegating the important claims of all parties to the nonexistent administrative system of the federal judiciary.

It must be further recognized that the discretion to abstain is properly exercised *solely* to avoid interfering with or disrupting an orderly state system of administration.

Allegheny Airlines, Inc. v. *Pennsylvania Pub. Util. Comm'n,* 465 F.2d 237 (1972), cert. denied 409 U.S. 1010 (1973); *Alabama Pub. Serv. Comm'n.* v. *Southern Ry. Co.,* 341 U.S. 341 (1951). However, in addition to the presence of this compelling factor in *Akin,* a weighing of all the proper factors makes the trial court's discretionary determination unassailable. Among the other more significant factors which decidedly tip the scales to abstention are the following:

1. The adverse impact that assumption of jurisdiction will have on the federal district court docket. *Law of the Federal Courts,* Wright (1970) at 196.
2. The subject matter of the litigation is a unique state resource, the management of which is a matter of great state concern. *Kaiser Steel Corp.* v. *Ranch Co.,* 391 U.S. 593 (1968); *Union Water Supply Corp. of Garciasville* v. *Vaughn,* 355 F. Supp. 211 (1972).
3. The extreme complexity of the subject matter and of the regulatory system, and the expertise and capability of the state system to administrate and adjudicate the subject matter. *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943); *R.R. Comm'n of Texas* v. *Rowan and Nichols Oil Co.,* 311 U.S. 570 (1941).
4. The existence of a pending parallel state case. *P.P.G. Indus.* v. *Continental Oil Co.* (Ct. App. 5th Cir.), No. 72-3148, decided May 9, 1973, 41 L.W. 2619.
5. The national policy of adherence to state law and procedure with regard to the acquisition and administration of water rights by the federal government. *In re Green River Drainage Area,* 147 F. Supp. 127 (1956); *United States* v. *Gerlach Livestock,* 339 U.S. 725 (1950).

Thus, when these factors are balanced against those asserted by the United States of which only their victory in the race to the courthouse and the advancement of a national interest are recognized by the court in *Akin* the

decision of the federal district court to abstain becomes manifestly correct. The pigeonholing approach of categorization of the *Akin* opinion in analyzing the doctrine of abstention results in unwarranted contraction of the doctrine. Abstention rests upon intrinsic tenets of federalism as well as a sound appreciation of the proper functions and relationship of the state and federal judicial systems. Such a significant doctrine of law should not be restricted by division of abstention into stilted classes but rather should be given effect when the weight of the factors urging abstention decidedly outbalances those factors which favor the assumption of jurisdiction.

In essence, the *Akin* decision is an unjustified substitution of opinion. The federal district court decision can be reversed only upon a clear finding of an abuse of discretion by the trial judge and not merely upon a difference of opinion between the Court of Appeals and the district court. The *Akin* opinion is void of any finding of an abuse of discretion; nor can such a finding be properly inferred from the court's opinion. The *Akin* opinion constitutes an impermissible substitution of its judgment for that of the district court.

II.

Comity Is a Proper Basis for the Dismissal of This Action by the Federal District Court

The court's opinion in *Akin* recognized that reasons of comity were a ground upon which the federal court dismissed this action. *Akin* at 4. However, the issue of comity is nowhere else mentioned in the court's opinion. Comity is a well-established, independent, and salutary principle which in and of itself is sufficient ground upon which the district court may repair the parties to state court.

> The word "comity" identifies the concept that federal courts, in the exercise of their jurisdiction, should give consideration to the sovereign status of the individual state. Commonly referred to as a "doctrine", comity is more a policy consideration than a rule of law. That policy consideration, however, underlies the rule established by the Supreme Court that federal courts should abstain to avoid needless conflict of federal jurisdiction with the administration by a state of its own affiairs. *See* Wright, Federal Courts, § 52 (1970). A sound conception of our federal system requires a federal court to withhold intervention with state procedure in the interest of maintaining harmony within the system. State of California v. Oroville-Wyandotte Irr. Dist., 409 F.2d 532 (9th Cir. 1969).
>
> *Dresser Industries, Inc* .v. *Insurance Co. of No. America,* 358 F. Supp. 327, 329 (1973).

Mr. Justice Black re-emphasized the importance of the concept of comity in *Younger* v. *Harris,* 401 U.S. 37, 43 (1970):

> Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.

Comity then is a sound conception of our federal system which requires a federal court to withhold intervention with state procedure in the interest of maintaining harmony within our nation. *See also, Pub. Serv. Comm'n of Utah* v. *Wycoff Co.,* 344 U.S. 237 (1952); *Commonwealth of Pennsylvania* v. *Williams,* 294 U.S. 176 (1935). Under *Eagle County,* the claims of the United States for water rights lie properly within the state court system. An action was pending pursuant to Colorado's Water Right Determination and Administration Act of 1969 to determine the relative rights of all parties to the San Juan River system (Water Division 7) at the time the United States chose to ignore that appropriate forum and attempted to bifurcate the water right administration procedure by filing its action in the United States District Court. Under

such circumstances, the District Court's policy determination that comity should prevail and the parties should proceed in the state courts should be respected. The absence of any discussion of comity in the *Akin* opinion is clear evidence that the District Court's opinion was not completely reviewed for determination of abuses of discretion but rather was merely replaced by the opinion of the Court of Appeals. If for no other reason, the absence of any discussion of comity is a compelling reason for granting this petition for rehearing in banc.

III.

A Rehearing in Banc Is Appropriate Because of the Significance of This Case.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the United States Court of Appeals for the Tenth Circuit is respectively requested to rehear this matter in banc. Not only are water rights of more than twelve hundred named defendants at stake, but fundamental questions of the doctrine of abstention, comity, and federal-state jurisdiction are in issue. In addition to the impact upon the State of Colorado and the citizens of this State, a decision in this matter has implications across the entire spectrum of federal-state relations. In particular, this case portends potential disruption of the well-developed water right determination and administration systems of all the western states which adhere to the appropriation doctrine of water law. Thus, this case presents a federal-state controversy of great magnitude and involves basic and significant issues that concern the quintessence of federalism. This widespread impact, the significant federal-state questions, and the importance of the ultimate decision to all appropriation states constitute appropriate grounds for an in banc rehearing.

Conclusion

For the foregoing reasons it is respectfully requested that the United States Court of Appeals for the Tenth Circuit rehear this matter in banc.

Respectfully submitted,

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On behalf of all Defendants and Intervenors:

/s/ John E. Bush
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Deputy Attorney General

/s/ Charles M. Elliott
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Assistant Attorney General

(Certificate Omitted in Printing)

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

October 25, 1974

90-2-2-167
AIR MAIL
Mr. Howard K. Phillips
Clerk
United States Court of Appeals
Tenth Circuit
Denver, Colorado 80202

Dear Mr. Phillips:

Re: No. 73-1807, United States v. Mary Akin, et al.

This has reference to the case entitled *United States of America* plaintiff-appellant v. *Mary Akin, et al.*, defendants-appellees, No. 73-1807 (D. Colo. No. 4497), in which the decision of the district court to dismiss this action under the doctrine of abstention was reversed and the cause remanded for proceedings consistent with the opinion of the court of appeals. We are in receipt of a copy of a revised page 3 of the opinion in this case. This page is identical to that appearing in the opinion except that the following footnote has been added:

> It has been called to our attention in an informal letter from one of the attorneys for defendants-appellees that this statement is incorrect. It is said that on that date Southwestern Colorado Water Conservation District filed a motion for the joinder of the United States under the McCarran Act. The record does not reveal the true fact. We note the suggested correction, even though it is not outcome determinative.

We agree with the conclusion in the footnote that the question of service and what had transpired with respect to the filing of the respective actions in the state court and the United States District Court are not determinative of the outcome on the appeal filed by the United States. In view,

however, of certain statements by the State of Colorado in its petition for rehearing *in banc*, we suggest that further explanation is appropriate.

Under Colorado law as codified in the Colorado Water Right Determination and Administration Act of 1969, sec. 148-21-1 *et seq.*, there is no provision for a general adjudication suit were all claimants to water rights from a given source are joined in one suit for the judicial determination of their respective rights *inter se*, as is commonly filed in most of the western states where water rights are an important matter of judicial determination. Under Colorado law, an individual files an application for a water right with the Water Clerk of the water division where the water in question is located. Section 148-21-18. A resumé of all applications filed within a given month is prepared by the Clerk and mailed to parties considered to be affected. Protests as to applications may be filed by those contesting them. Copies of applications, protests, etc., may be served as ordered by the Court. As a general rule, no earlier priority date can be recognized by the water court than the year within which the filing was made by the party.

The Supreme Court of the United States has expressly ruled, however, that reserved rights of the United States are governed by federal law and that the true priority date is the date of the reservation. *United States* v. *District Court, County of Eagle, Colorado,* 401 U.S. 520 (1970).

The United States had never been served with any notices of applications for water rights within Water Division No. 7 until January 1973, after Southwest Colorado Water Conservancy District filed a motion for joinder of the United States under the McCarran Act. Until such time as the United States was served and joined as a party to proceedings in the state court those proceedings were not binding upon the United States and they should not adversely affect the prior existing water rights of the

United States. Therefore, it cannot be said that the water rights of the United States were at issue in any state court proceedings until such time as the United States was joined and served in those proceedings. We believe the foregoing should clarify any misunderstanding with respect to the sentence to which the footnote pertains.

Please call this to the attention of the Court and, if this matter is considered important to the outcome of the petition for rehearing *in banc*, we would be happy to brief it in detail if the Court should so desire.

Sincerely,

WALLACE H. JOHNSON
Assistant Attorney General
Land and Natural Resources Division

By: /s/ EDMUND B. CLARK
Edmund B. Clark
Chief, Appellate Section

NOVEMBER TERM—NOVEMBER 12, 1974

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges, and Honorable Talbot Smith, District Judge.*

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* Sitting by designation.

No. 73-1807

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

v.

AKIN, MARY, ET AL., *Defendants-Appellees.*

SOUTHERN UTE INDIAN TRIBE, ET AL., *Amici Curiae.*

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the Defendants-Appellees in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Hill and Doyle, and District Judge Smith, to whom the case was argued and submitted.

Upon further consideration, the suggestion for rehearing en banc is denied. Judges Holloway and Barrett would grant the suggestion for rehearing en banc.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

NOVEMBER TERM—DECEMBER 12, 1974

Before Honorable Delmas C. Hill and Honorable William E. Doyle, Circuit Judges.

No. 73-1807

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

v.

AKIN, MARY, ET AL., *Defendants-Appellees.*

SOUTHERN UTE INDIAN TRIBE, ET AL., *Amici Curiae.*

This matter comes on for consideration of Defendants-Appellees' motion to stay the mandate in the captioned cause pending petition for writ of certiorari.

Upon consideration whereof, it is ORDERED that the mandate of this Court issued November 20, 1974, be and it is hereby recalled.

It is further ORDERED that the mandate shall be stayed until January 13, 1975, pending certiorari and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellees have timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

The Clerk shall forward a certified copy of this Order to the Clerk of the United States District Court for the District of Colorado.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

NOVEMBER TERM — JANUARY 10, 1975

Before The Honorable Delmas C. Hill and The Honorable William E. Doyle, Circuit Judges

No. 73-1807

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

vs.

AKIN, MARY, ET AL., *Defendant-Appellees.*

This matter comes on for consideration of appellees motion for further stay of mandate pending application for a petition for writ of certiorari.

Upon consideration whereof, it is ordered that the mandate is further stayed to and including February 9, 1975, pending timely filing by appellees of a petition for writ of certiorari in the Supreme Court of the United States. If, on or before that date, the Clerk of this Court shall receive notice from the Clerk of the Supreme Court of the United States that a timely petition for writ of certiorari has been filed in that Court, the stay of mandate shall continue until final disposition by the Supreme Court.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, *Clerk*

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D. C. 20543

April 28, 1975

Robert L. McCarty, Esq.
McCarty & Noone
1225 Connecticut Avenue, N. W.
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Washington, D. C. 20036

RE: COLORADO RIVER WATER CONSERVATION DIST. v. UNITED STATES, No. 74-940 and AKIN v. UNITED STATES, No. 74-949

Dear Mr. McCarty:

The Court today entered the following order in the above cases:

> "The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument. Mr. Justice Douglas took no part in the consideration or decision of these petitions."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable in No. 74-940.

Very truly yours,

MICHAEL RODAK, JR., *Clerk*
By /s/ HELEN K. LOUGHRAN
(Mrs.) Helen K. Loughran
Assistant Clerk